In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1516

GEORGE C. PARKER AND JAMES W. BOYLAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question is whether the court below properly dismissed petitioners' interlocutory appeal, which sought review (before trial) of the district court's denial of a motion to dismiss an indictment.

On June 28, 1972, an indictment was returned in the United States District Court for the Eastern District of California (in Fresno) charging petitioners with one count of conspiracy (18 U.S.C. 371), twelve counts of misapplication by a bank officer (18 U.S.C. 656), seven counts of false entry by bank officers (18 U.S.C. 1005), nineteen counts of aiding and abetting (18 U.S.C. 2), and two counts of illegal receipt of commissions or gifts (18 U.S.C. 215). On October 11, 1972, another indictment was returned by a different grand jury in the Eastern District of California (in Sacramento) which was substantially identical to the earlier indictment except for some changes in the language of

the conspiracy and misapplication counts with respect to criminal intent. On October 30, 1972, the earlier indictment was dismissed on the government's motion.

Thereafter, on December 11, 1972, petitioners filed a motion to dismiss the second indictment, contending that it was improperly based on hearsay. From the denial by the district court of that motion, petitioners attempted to take an appeal to the court of appeals, which, *per curiam,* dismissed the appeal as interlocutory and therefore premature (Pet. App.).

It is uniformly held that an order denying a motion to dismiss an indictment is not a final decision within the meaning of 28 U.S.C. 1291 and is therefore not appealable. See, *e.g., United States* v. *Doucet,* 461 F. 2d 1095 (C.A. 5); *United States ex rel. Rosenberg* v. *United States District Court for the Eastern District of Pennsylvania,* 460 F. 2d 1233 (C.A. 3); *The People of the Territory of Guam* v. *Lefever,* 454 F. 2d 270 (C.A. 9); *United States* v. *Curry,* 442 F. 2d 428 (C.A. 4); *United States* v. *Garber,* 413 F. 2d 284 (C.A. 2); see also *DiBella* v. *United States,* 369 U.S. 121. The court below was therefore correct in dismissing the appeal. The merits of petitioners' claim regarding the propriety of the indictment can be raised upon direct review of any criminal conviction that may result.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

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